

## HOW TENNESSEE JUDGES LOOK AT DEFENDANTS' ABILITY TO PAY FEES AND FINES

Fees and fines are an important part of Tennessee's criminal justice system – both to punish criminal acts and fund an essential government function. This report dives deeper into one item on our list of [potential policy options](#) to address the side-effects of fees, fines, and other legal financial obligations (LFOs). Specifically, it looks at how a person's ability to pay fees and fines factors into what they ultimately owe and highlights several options for state-level policy change.

Prior reports [walk through](#) the 360+ LFOs people can accrue in the state's criminal justice system, their effects on different stakeholders, the [revenue they generate](#) for our state and local governments, and opportunities to [improve data collection](#).

### KEY TAKEAWAYS

- The effect that fees, fines, and other legal financial obligations have on people required to pay them (and the justice system overall) largely depends on their *ability* to pay them.
- A patchwork of provisions in Tennessee code offers wide flexibility but little consistency in how courts should address defendants' ability to pay fees and fines.
- Judges across the state vary in when and how they determine a defendant's ability to pay.
- The judicial discretion baked into current law recognizes that each case is unique but can also generate unequal outcomes that diverge by jurisdiction and/or defendants' economic status.
- Options to address these challenges include gathering better data on current practices and making state law more consistent. Policymakers could also consider graduated fines.

### Background

**People can accrue a multitude of fees and fines as they move through Tennessee's criminal justice system (Figure 1).** The amounts owed depend on the offense, the actors involved, and a case's ultimate outcome, but they can add up quickly. (1) While publicly available data is limited, it is not unusual for total debts to reach several thousand dollars or more. (2)

### Terminology

Criminal justice fees and fines, criminal justice financial obligations, legal financial obligations, and criminal justice debt all refer to costs a person may owe as they move through the criminal justice system. These terms do not include the costs of private legal representation.

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**The impact on people required to pay fees and fines largely depends on their ability to do so.**

Defendants' different economic backgrounds necessarily mean financial penalties are not felt evenly. (3)

Due to the demographics of crime and policing, the people most likely to accrue legal financial obligations tend to be relatively poor. (4) (5)

**Figure 1. People Can Accrue a Multitude of Financial Obligations as They Move Through Tennessee's Criminal Justice System**

Examples of Criminal Justice Fees and Fines Authorized in Tennessee (2019)

 <b>Pre-Trial</b>	 <b>Trial &amp; Other Court</b>	 <b>Conviction &amp; Incarceration</b>	 <b>Community Supervision</b>
<ul style="list-style-type: none"> <li>• Booking &amp; Processing Fee</li> <li>• Daily Jail Fee</li> <li>• Cash Bail or Bail Bond Fee</li> <li>• Public Defender &amp; Indigent Counsel Fees</li> <li>• Electronic Traffic Citation Fee</li> <li>• Public Record Search Fee</li> <li>• BAC Test Fee</li> <li>• Transportation Fee</li> <li>• Citation in Lieu of Arrest Fee</li> <li>• Petition, Warrant, &amp; Citation Issued Fees</li> <li>• Credit Card Processing Fee</li> </ul>	<ul style="list-style-type: none"> <li>• State &amp; Local Litigation Taxes</li> <li>• Institution of Criminal Case Fee</li> <li>• Record Fees</li> <li>• Victim-Offender Mediation Center Litigation Tax</li> <li>• Victim Assistance Program Fee</li> <li>• Jail/Courtroom Construction/Renovation Tax</li> <li>• General Sessions Judge Tax</li> <li>• Courthouse Security Tax</li> <li>• Judge/Clerk Training Fee</li> <li>• Failure to Appear Fees</li> <li>• Cert. of Criminal History Fee</li> <li>• Drug Testing Fees</li> <li>• Criminal Contempt Fee</li> <li>• Subpoena Issuance Fee</li> <li>• Continuance Request Fee</li> <li>• Filing Fee</li> <li>• Filing Subscription Fee</li> <li>• Copy Fees</li> <li>• Certification Fees</li> <li>• Service of Process Fees</li> <li>• Data Processing Fees</li> <li>• Jury Security Fees</li> <li>• Court Case Fee</li> <li>• Law Library Fees</li> <li>• Prisoner Escort Fee</li> </ul>	<ul style="list-style-type: none"> <li>• Fines</li> <li>• Restitution</li> <li>• Offense-Specific Conviction Fees &amp; Contributions</li> <li>• Property Seizures</li> <li>• Property Seizure Fee</li> <li>• Property Seizure Storage Fee</li> <li>• Jailers' Fee</li> <li>• Fees for Incidentals (uniforms, soap, etc.)</li> <li>• Medical Co-Pays</li> <li>• Telephone Fees</li> <li>• Transportation Costs</li> <li>• Work Release Fees</li> <li>• Education Testing Fees (e.g. GED)</li> </ul>	<ul style="list-style-type: none"> <li>• Supervision Fee</li> <li>• Electronic Monitoring Fee</li> <li>• Ignition Interlock Fee</li> <li>• Technology Fee</li> <li>• Drug Testing Fee</li> <li>• DNA Testing Fee</li> <li>• Transaction Fee</li> <li>• Sex Offender Registry Fee</li> <li>• Supervision Violation Proceedings Fee</li> <li>• Behavioral Health Treatment Costs</li> <li>• Records Expungement Fee</li> <li>• Drivers License Reinstatement Fee</li> </ul>

This list is not comprehensive.

Source: The Sycamore Institute's review of Tennessee state law

**For people less able to pay, fees and fines can prolong their involvement in the criminal justice system and make it harder to get ahead.** (6)

For example, someone reentering society from incarceration with unpaid debts and a revoked driver's license may have more trouble securing a job, housing, and financial stability - all associated with reduced recidivism. (7) (8)

**Fees and fines that people don't have the ability to pay can also put more burden on the justice system itself.** (9) (1) A majority of criminal fees and fines go uncollected,

at least in part because many people who owe them do not have a lot of money. (6) (9) The unpaid debts can result in additional court hearings, supervision costs, and even incarceration - all of which may turn this potential revenue into a net cost instead. Meanwhile, the time and resources spent trying to collect unpaid debt can also become a drain on local budgets. (10)

**Ability-to-Pay in Tennessee State Law**

**A patchwork of provisions in Tennessee code offers wide flexibility but little consistency in how courts should address defendants' ability to pay fees, fines, and other legal costs.**

Statute lays out many instances - some broad, some specific - in which a court may consider an individual's financial circumstances when deciding about certain criminal fees, taxes, fines, and restitution.

## Inconsistent and Ambiguous

**State law includes at least six distinct frameworks for officials to use in different situations to assess a criminal defendant's ability to pay (Appendix Table 1).** For example, to receive appointed counsel, an indigent defendant is one who cannot afford a competent attorney based on a judge's review of the individual's income and assets, customary attorneys' fees, and federal poverty guidelines. (11) To qualify for reduced electronic monitoring costs, however, a person is deemed indigent if their income is below 185% of the federal poverty line. (12)

**Dozens of clauses in state law allow or require courts to base various financial obligations on hardship, indigency, and ability to pay - but do not define those terms (Appendix Table 1).** For example, judges can waive or modify debts based on a defendant's ability to pay, future ability to pay, financial situation or condition, hardship, having sufficient funds to pay, or having anticipated future funds to pay. Examples of when these and other broad and undefined terms apply include:

- Modification of monthly community supervision fees for probationers and parolees. (13)
- Eligibility for and amount of bail bond for defendants released from jail pre-trial. (14)
- Amount of any required fines and/or restitution. (15)
- Suspension of litigation taxes or eligibility for community service in lieu of litigation taxes. (16)
- Cost of GPS tracking, ignition interlock devices, and drug/alcohol monitoring for pre-trial defendants released on bail, defendants granted pre-trial diversion, DUI offenders, people under community supervision, and other defendants. (17)

**State law is often ambiguous about if, when, and how to review someone's ability to pay and subsequently waive or modify financial obligations.** For example, judges can modify mandatory minimum fines for certain DUI and drug charges if a person is declared indigent using a set of specific factors. However, the law does not actually compel judges to review that person's ability to pay. Neither does it say how to interpret the specified criteria or what standards should guide the reduction or waiver of minimum fines when a judge does declare someone indigent. (18)

**The law sometimes applies different standards and criteria to similar financial obligations.** For example, certain types of transcript fees can be waived if a person "does not have sufficient funds" to pay them. (19) Suspending other similar types of fees, however, depends on a definition of indigency that considers a defendant's ability to afford an attorney. (20)

## Piecemeal Approach Obscures Total Debt

**Few of the relevant provisions in state law recognize the potential that people will face multiple legal financial obligations.** In most instances, ability-to-pay reviews are mentioned in the context of a specific type of legal cost without consideration for the dozens of other obligations any given defendant might owe.

**Finally, some ability-to-pay rules only apply after a person falls behind on their debts and faces legal consequences.** For example, the only time state law explicitly calls for a review of a defendant's total debt from fines, litigation taxes, and other costs is after they have defaulted and risk suspension of their driver's license. (20)

## Determining Ability-to-Pay in Practice

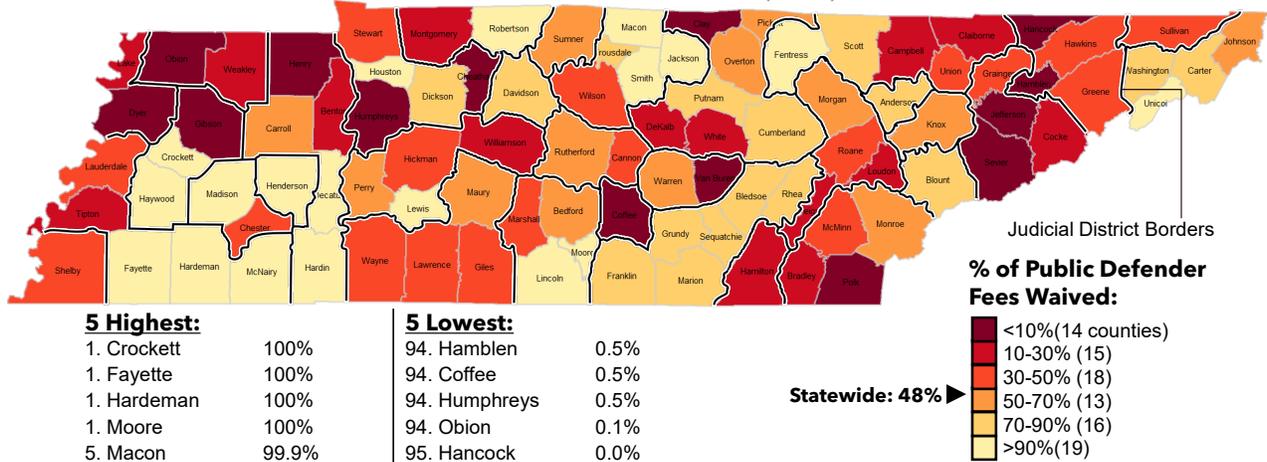
**Judges across the state vary in how they determine a defendant's ability to pay LFOs.** Different judges require different kinds and amounts of personal financial information. For example, some use the Supreme Court's affidavit of indigency for most ability-to-pay decisions. Others have reportedly asked for informal self-attestations or social security numbers. (2) (21) (22) In at least six recent cases, the state's Criminal Courts of Appeal found that lower courts failed to adequately consider a person's ability to pay when setting restitution. (23) (24) (25) (26) (27) (28) (29) Full dockets and a perceived need to process them quickly may also contribute to inadequate or inconsistent reviews. (2) (21) (22)

**Not all judges use the same approach to change an indigent person's legal financial obligations.** Under state law, judges can either waive LFOs for indigent defendants or reduce them to some lesser amount. Judges might also convert criminal debts into civil debt, which waives the criminal consequences without reducing the amount owed. These civil debts carry new costs and consequences of their own, however. Based on Sycamore's conversations with current and former local officials in Davidson and Shelby Counties, these practices may vary from one county to the next and sometimes even from courtroom to courtroom in the same county.

**There is no consistent point in a case when the court reviews a defendant's ability to pay legal costs.** For example, the initial indigency determinations required for access to a public defender do not necessarily apply to other financial obligations. Unless the law explicitly requires one, defendants must request a review of their ability to pay fees and fines. Sometimes, defendants must establish their indigency multiple times during the consideration of a case. (2)

## Figure 2. Counties Vary Widely in How Often Judges Waive the Administrative Fee to Use a Public Defender

Percent of Cases in Which Public Defender Fees Were Waived (2020)



Source: The Sycamore Institute's analysis of data from the Tennessee Administrative Office of the Courts (30)

**Data on public defender administration fees shed light on the variation in practices across the state.** People deemed indigent and assigned a public defender owe a \$50 administrative fee that the court can waive, reduce, or raise to a maximum of \$200. Courts must report to the state how often they waive these fees. (31) According to the available data, Tennessee judges waived administrative fees for about half of people who used public defenders in 2020 (**Figure 2**). However, the rate varies widely by county. Over 90% of public defender fees were waived in 19 counties while less than 10% were waived in 14 counties. (32)

## The Trade-Offs of Current Law and Practice

**The judicial discretion baked into current law recognizes that each case is unique but can also generate unequal outcomes.** Current law and court rules allow considerable flexibility in determining a defendant's ability to pay most legal financial obligations. This permits individualized judgments of each circumstance but can also lead to inconsistent outcomes. For example, two people with the same offenses and ability to pay may face different financial consequences based on which jurisdiction or judge hears their cases. Likewise, some people with adequate financial resources may see their debts waived while others with less or no ability to pay do not.

## Policy Options to Address These Trade-Offs

State policymakers could explore a number of ways to address any unwanted side-effects of current law and practice.

### Better Data on Current Practices

**Better statewide data on the practices used to determine defendants' ability to pay LFOs would shed light on which practices are exceptions and which are the rule.** Much of what we know about inconsistencies in how, when, and what judges consider and decide is based on anecdotal information from a handful of counties across the state. Better data would provide a clearer picture of the degree and range of variation under current law.

### More Standards and Consistency for Assessing Ability to Pay

**Policymakers could encourage or require more consistency in when and how courts review and make accommodations for a defendant's financial situation.** Options range from supporting the voluntary adoption of more uniform practices to mandating specific actions, criteria, standards, and timelines. (33) (34) (35) Each option will come with its own set of trade-offs. For example, making judges proactively assess a person's ability to pay could require more court resources on the front end. On the back end, it could also reduce the negative impact of unpaid debts on both defendants and the justice system itself.

**Current state requirements already provide some guideposts for any changes to make standards more uniform.** For example, the Tennessee Supreme Court defines indigent as under 125% of the poverty level under one of its indigency standards. (22) (36) It also provides uniform affidavit forms for implementing this and two other specific indigency standards laid out in law. (37) (38) (39) Meanwhile, the state employs numerous specific income and asset eligibility qualifications for programs designed to serve indigent individuals. (40) (41) (42) (43) (44) (45)

**Approaches from other states that might also provide examples for Tennessee policymakers include:**

- The Ohio Supreme Court publishes a bench card or “cheat sheet” with guidelines and the factors judges should consider when making decisions about fines and other legal financial obligations. (46)
- Texas requires courts to conduct assessments of ability-to-pay for all fine-only offenses and requires either a payment plan, fine waiver, or alternative sentence (e.g. community service) if an individual is unable to pay. (47)
- Statutes in at least seven other states provide a uniform default definition of indigency while giving judges the flexibility to use a different standard. The thresholds for those standards vary between 125-200% of poverty. (1) (48)

## Graduated Fines

**Lawmakers could consider switching to a sliding-scale system of fines that automatically vary based on a defendant's financial resources.** Traditionally, financial penalties for crimes are set based on the offense alone. Some jurisdictions instead use a system known as “day fines” that factor a defendant's financial situation into any penalties they might face. While effective administration may require greater resources, jurisdictions that have experimented with day fines in the U.S. generally found them to increase both collection rates and amounts. (9) (49) (50) (51) (52)

## Parting Words

In both statute and practice, there is little consistency to how Tennessee's criminal courts consider someone's ability to pay whatever fees and fines our justice system might levy on them. As a result, it is not uncommon for similar cases to yield unequal outcomes that diverge by geography and/or defendants' economic status. Reforms to make this process more consistent and transparent could have a range of benefits for public safety, public finances, and public trust.

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## Appendix Table 1. Tennessee Law's Criteria for Determining One's Ability to Pay Criminal Costs Vary by Circumstance and in Specificity

Examples of Statutory Criteria for Considering Defendants' Ability to Pay Legal Financial Obligations

Definitions and Criteria/Considerations	Applicability
<p><b>Hardship</b> (§ 40-28-202) cases include probationers, parolees, and inmates on work release who receive Social Security or welfare benefits, have uncovered medical expenses exceeding 25% of gross monthly income, are physically or mentally incapable of working as certified by a physician, get transferred to another state, have an excessive amount of gross monthly income obligated for court ordered expenses such as alimony, child support, etc., and are below poverty.</p>	<p>Supervision fees for individuals under community supervision and inmates granted work release (§ 40-28-201, 40-36-306)</p> <p>Monthly criminal injuries compensation fund contributions for certain individuals under community supervision (§ 40-36-306)</p>
<p><b>Indigent</b> (§ 40-14-201, 40-14-202) means any person "who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney" based on consideration of needed representation services, costs of those services in the community, any required bond amounts and they were paid, poverty guidelines, and the defendant's income and property.</p>	<p>Eligibility and costs for court-appointed counsel (§ 40-14-202)</p> <p>Modification of minimum mandatory fines for drug offenses and DUI offenses (§ 39-17-428, 50-10-403)</p> <p>Cost of a mental health assessment for stalking offenses (§ 39-17-428)</p> <p>Suspension of fees, fines, litigation taxes, jail fees, and other incarceration costs for those facing driver's license suspension due to failure to pay (§ 40-24-105)</p>
<p><b>Indigent</b> (§ 55-10-402) status must be based on a consideration of needed drug/alcohol treatment services and the usual cost for those services, poverty guidelines, and the defendant's income and property.</p>	<p>Cost of drug/alcohol assessment, treatment and monitoring for individuals on probation (§ 40-35-303)</p> <p>Ability for DUI offenders to fulfill court-ordered requirements with free/low-cost substance abuse treatment services (§ 55-10-402)</p>
<p><b>Indigent</b> (§ 55-10-419) means having an annual, after-tax income ≤185% of the poverty.</p>	<p>Cost of any required ignition interlock devices (§ 55-10-419(d), 55-10-425(g))</p>
<p><b>Indigent</b> (§ 8-21-401 and TN Supreme Court Rule 29) status must be based on a consideration of a defendant's sources of income, expenses, assets, and debts.</p>	<p>Court clerk fees (§ 8-21-401, 8-21-409)</p> <p>Proceeding costs for individuals appealing certain criminal seizures and forfeitures (§ 40-33-107(3), § 40-33-206(b)(2), § 53-11-201(c)(3), § 57-09-202(b)(1))</p>
<p>Up to 10% of offender's net income (§ 40-28-201(a)(3)(B), 40-36-306(e))</p>	<p>Amount of monthly fee for individuals assigned Community Corrections (§ 40-36-306(e))</p> <p>Amount of monthly contribution to Criminal Injuries Compensation Fund for individuals under community supervision (§ 40-28-201(a)(3)(B))</p>

(continued on next page)

## Appendix Table 1

(continued)

Definitions and Criteria/Considerations	Applicability
<p>Various undefined terms and criteria for courts to consider:</p> <ul style="list-style-type: none"> <li>• Indigent</li> <li>• Hardship</li> <li>• Ability to Pay</li> <li>• Future Ability to Pay</li> <li>• Inability to Pay</li> <li>• Sufficient Funds to Pay</li> <li>• Without Anticipated Future Funds to Pay</li> <li>• Financial Situation</li> <li>• Financial Resources</li> <li>• Financial Condition</li> </ul>	<p>Eligibility for and amount of bail (§40-11-115(b)(2), 40-11-118(b)(2))</p> <p>Amount of required fines and/or restitution (§ 40-35-207(a)(7), 40-35-304)</p> <p>Suspension of litigation taxes or community service in lieu of litigation taxes (§ 40-25-123(b))</p> <p>Monthly community supervision fees (§ 40-35-303(p)(6)(A), 40-35-303(i)(l))</p> <p>County booking and processing fees (§ 40-07-122)</p> <p>Modification of fines once a defendant has failed to pay (§ 40-24-104(a))</p> <p>Administration fee for using court-appointed counsel (§ 40-14-103(b))</p> <p>Transcript fees for defendants granted an appeal (§ 40-14-312)</p> <p>Cost of GPS tracking, ignition interlock devices, and drug/alcohol monitoring for pre-trial defendants released on bail, individuals under community supervision, defendants granted pre-trial diversion, and DUI offenders (§ 40-11-152(h), 40-11-118(d)(2)(B), 40-11-148(b)(2)(B), 40-15-105(a)(2)(l), 40-28-117(2)(b), 40-33-211(c)(3)(A), 40-33-211(f)(3)(A), 55-10-402(h)(7)(a), 55-10-402(h)(7)(c), 55-10-402(d)(2))</p> <p>Costs of evaluation, treatment, monitoring, ID cards, litigation taxes, and victim’s mental health treatment for convicted sex offenders (§ 39-13-705(c), 39-13-706, 40-39-213(a), 40-39-303(c), 39-13-708(e), 40-39-305(b), 33-06-805(b))</p> <p>Cost of supervision, counseling, or treatment for defendants released on pre-trial or judicial diversion (§ 40-15-105(a)(2)(F), 40-35-313(a)(1))</p> <p>Modification of required fines for assault convictions involving a domestic assault victim (§ 39-13-101(b)(3), § 39-13-102(e)(2), 39-13-111(c)(5))</p> <p>Cost of incarceration and treatment for work release inmates (§ 41-02-128(c))</p> <p>Fee for participation in a victims impact panel program for DUI offenders (§ 55-10-410(a)(1)(B))</p> <p>Cost of drug/alcohol assessment, treatment and monitoring for misdemeanor probationers and repeat DUI offenders (§ 40-35-303(i)(2), 55-50-507)</p> <p>Fee for attending a drug offender school for certain drug offenses (§ 39-17-418(f)(2))</p> <p>Cost of psychological evaluation and counseling for animal cruelty offenses (§ 39-14-212(f), 39-14-217(h))</p> <p>Cost of any required pre-sentencing physical or mental health exams (§ 40-35-205(c))</p> <p>Voting rights restoration for individuals ineligible due to unpaid court costs (§ 40-29-202(b)(2))</p> <p>Cost of fingerprint analysis for prisoners petitioning for post-conviction relief (§ 40-30-406)</p>

Source: The Sycamore Institute’s review of the Tennessee code